FILED
SUPREME COURT, U. S.

No. 31..

IN THE

Supreme Court of the United States

JEAN E. KIRKLAND, FIDEL LEAL FARMS, LA SARA HARVESTING ASS'N, RIO VISTA COTTON GROWERS' ASS'N, VALLEY FARMERS COOPERATIVE HARVESTING ASS'N, LAKE FARMERS' COOPERATIVE SOCIETY, PRODUCER, HARVESTER AND FARMER COOPERATIVE SOCIETY, CONTINENTAL FARMERS' COOPERATIVE SOCIETY, RIO-VAL FARMERS' COOPERATIVE SOCIETY, SEBASTIAN FARMERS' COOPERATIVE SOCIETY, WILLAMAR FARMERS' COOPERATIVE LABOR SOCIETY, HARLINGEN FARMERS & PRODUCERS GIN, and COYOTES HARVESTING ASS'N,

Petitioners

versus

CHARLES E. JOHNSON and E. E. SCANNELL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CHARLES E. JOHNSON and E. E. SCANNELL,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 12, 1961, motion for rehearing denied June 1, 1961.

Opinions Below

The District Court entered no written opinion. Its order (R. 146-148)[1] is unreported. It is appended hereto in Apendix "A", infra, 34. The opinion of the Court of Appeals (Tr. 272-286) is reported at 290 F.2d 440. It is appended hereto in Appendix "A", infra, 15.

Jurisdiction

The judgment of the Court of Appeals was entered on April 12, 1961. A motion for rehearing was filed on April 28, 1961. It was denied by order entered June 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254(1).

Question Presented

The sole question in this case is whether, without joining the Secretary of Labor, effective relief may be granted in a proceeding attempting to enjoin local enforcement officers of the Department of Labor from enforcing a ruling promulgated by the Secretary of Labor without authority in law.

Statutes, Rules, and Regulations Involved

The pertinent portions of the statutes, rules and regulations involved are set forth in Appendix "B", infra, 37.

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[1] Reference to (R.) is to the record printed for use of the Court of Appeals. Reference to (Tr.) is to the certified transcript of record. Reference to (App.) is to one of the Appendices included at the end of this petition.

Statement of the Case

This case involves a suit by petitioners to enjoin certain enforcement officials of the Department of Labor from enforcing a ruling (R. 36-38; App. "B", 39) promulgated by the Secretary of Labor.

Petitioners are employers of Mexican Nationals as labor under the Migrant Labor Program (7 U.S.C.A., Section 1461, et seq.). (R. 30-32). Respondent Johnson is the official of the Department of Labor to whom has been delegated the enforcement functions under the Migrant Labor Program in the Rio Grande Valley area (R. 33-34). Respondent Scannell is manager of the United States Department of Labor Reception Center at Hidalgo, Texas. He has the authority in the Rio Grande Valley area to refuse to allow employers to contract workers at a wage rate less than any rate which is required by the Secretary of Labor. (R. 34). Both respondents reside within the jurisdiction of the United States District Court for the Southern District of Texas.

The ruling which is challenged attempted to require petitioners and all other employers of Mexican National labor under the Migrant Labor Program (7 U.S.C.A., Section 1461, et seq.) in the Rio Grande Valley area to abide by a so-called "90-10 policy" in paying Mexican National workers. In the Courts below, Petitioners argued that the Secretary was acting without authority in law in promulgating the ruling. Petitioners therefore sought to enjoin enforcement of the ruling.

The trial court, basing jurisdiction on 28 U.S.C.A., Sections 1331(a) and 1337, granted a preliminary injunction. (R. 146-148; App. "A", 34). The Court of Appeals decided that regardless of the merit of petitioners' case, it could not render a decision in favor of petitioners because the Secretary of Labor was an indispensable party and was not properly joined. (App. "A", 29).

Reasons for Granting the Writ

In determining that the Secretary of Labor is an indispensable party, the Court of Appeals misapplied the law as spelled out in the applicable decisions of this Court. This Court has clearly and consistently set down the rule to be applied when the necessity of enjoining a superior official is brought into question. *Colorado v. Toll*, 268 U.S. 228, 45 S. Ct. 505, 69 L.Ed. 927; *Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868; *Williams v. Fanning*, 332 U.S. 490. 68 S.Ct. 188, 92 L.Ed. 95; *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 69 S.Ct. 968, 93 L.Ed. 1231.

The rule is generally summarized as follows:

> ". . . the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." *Williams v. Fanning, supra*, 332 U.S. at p. 493.

The subordinate may, however, be enjoined "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate

official who is before the court. . . ." *Williams v. Fanning, supra*, 332 U.S. at p. 493. In such case, it is immaterial that the local subordinate "would be left under a command of his superior to do what the court has forbidden." *Williams v. Fanning, supra*, 332 U.S. at p. 494.

The Court of Appeals pays lip-service to the foregoing test. (App. "A", 28-29). But it devolops its own rule in deciding the case at bar. It thus translates the rule of *William v. Fanning* as follows (App. "A", 29):

> "This means that the problem must be tested in terms of the result if, under the particular setting, the superior—not a party and hence under no coercive court order—*sits tight and does absolutely nothing.*
>
> "On *that* test the Secretary of Labor is here indispensable. . . ." (Emphasis supplied).

In formulating its test the Court of Appeals exhibits concern over the fact that the Secretary has the duty to make certain determinations under 7 U.S.C.A., Section 1463, and that until those determinations are made no worker may be allowed to cross the border. The Court concludes that if the Secretary is balked in his present attempt to enforce the "90-10 policy" he will react by "sitting tight" and refusing to make the determination required of him by statute, and by such means attempt to accomplish his ends.[2]

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[2] While the ruling in question may be read as containing the threat that the Secretary will cut off the supply of workers to the Valley if the 90-10 policy is not complied

The course of action which the Court of Appeals anticipates the Secretary will take would stop workers from crossing the border. The Court concludes, therefore, that petitioners "would gain naught by this litigation" (App. "A", 29) since any decision that the 90-10 policy may not be enforced in the employment of workers would be meaningless if there were no workers to employ. And there would be no workers to employ if the Secretary were to react to the decision by cutting off the supply of workers to the Rio Grande Valley. It is this presumed reaction by the Secretary to an adverse ruling in the case at bar which causes the Court to hold that its order would be "ineffectual" and that no relief could be granted in this case. (App. "A", 30).

It will be seen immediately that the reasoning of the Court of Appeals interjects a new element into the considerations spelled out in *Williams v. Fanning, supra.*

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with, this reaction is certainly not assured by the ruling. Furthermore, we note that in every year in which the Migrant Labor Agreement has been in force the Secretary has recognized the need to import labor and has certified the Rio Grande Valley as eligible for such labor. (R. 39). We note further that in each of past years, the Secretary has attempted to enforce the 90-10 policy by issuing a separate ruling concerning same (R. 104-142; R. 36-38; App. "B", 39). The parties have stipulated in the Court of Appeals that the "threatened enforcement" of the 90-10 policy "is as real today as it was at the beginning of the cotton picking season, and the consequences of that enforcement are the same today as they were at the beginning of the cotton picking season." (Tr. 270; App. "C", 42). It is clear from the above that the Secretary's efforts have so far been directed towards affirmatively establishing and enforcing a policy, and that he has not refused to carry out his duties merely because the "90-10 policy" was not heeded by employers.

If, in determining whether relief will be effective, an inquiry may be made not only as to the effect of the relief to be granted, but also as to the possible reaction of the superior to the relief granted, the rule of *Williams v. Fanning* is completely nullified. For if the Court of Appeals be correct then the enforcement of rulings of a superior may never be enjoined by suit against local subordinates, even though illegal, where the superior, in administering a program, is given any duties to perform, whether discretionary or ministerial. The Court of Appeals deems it proper to assume that the superior will refuse to perform his duties if he cannot superimpose upon their execution illegal requirements. We may just as well assume that in *Colorado v. Toll, supra*, the Secretary of Interior, in a fit of pique, would refuse permission to anyone for access to the national parks; or in *Williams v. Fanning, supra*, that the Postmaster General would refuse to cause the mail to be delivered to Los Angeles. According to the Court of Appeals it would make no difference whether the anticipated reaction of the superior were arbitrary or not, or whether the reaction were based upon legal or illegal considerations. Merely because the reaction is possible, the Court holds that the injunction will not lie.

It is unusual, to say the least, to presuppose that a Cabinet officer will abdicate his statutory functions unless he is allowed to include within their exercise illegal considerations not founded in law. Indeed, the rule is otherwise. Thus, in *Shaughnessy v. Pedreiro, supra*, this Court stated (349 U.S. at p. 53):

> "We cannot assume that a decision on the merits in a court of appeals on a question of this kind, subject to review by this Court, would be lightly disregarded. . . ."

Nor can we assume, in the case at bar, that the Secretary will take lightly an injunction against his subordinates enjoining them from enforcing a ruling which has been held illegal. Such an assumption is all the more startling as it is based solely upon the possibility that the Secretary will not allow workers to cross the border—an anticipated counter-measure by the Secretary which would cause an end to the program itself. If assumptions as to possible reactions by the Secretary are proper, it is much more reasonable to assume that he will abide by the decision of the Court than that he will stop the program in its entirety.

The Court of Appeals does recognize (App. "A", 30) that any anticipated counter-measure of the Secretary of Labor

> "would not likely give him license to withhold his discretionary duty arbitrarily. Undoubtedly any *such* conduct is subject to some judicial scrutiny. But by whatever name called—review under the Administrative Procedure Act, 5 U.S.C.A. Sections 1001-1011, mandamus or other extra-ordinary writ—*this* would involve the Secretary directly. And for *that* he should, and must, be a party." (Emphasis supplied).

Petitioners have no quarrel with the Court's observations. Should the Secretary arbitrarily refuse to allow workers to enter the United States, he

would be subject to some extraordinary writ to force him to do his duty. But the Court's observations do not relate to the case at bar. At the present time a mandamus action to require the Secretary to allow workers to cross the border would be premature. He is allowing workers to cross. (R. 34-36). Nor is there a threat that he will discontinue allowing them to cross.[2] As a matter of fact, no such action by the Secretary may reasonably be anticipated until and unless the enforcement of his present ruling is enjoined, thereby requiring him either to accept the result or to stop the workers from crossing the border.

All that need be said of the reasoning of the Court of Appeals is that if the Secretary's actions were different from what they were, petitioners' remedy would be different from what it is. Certainly there is no occasion to anticipate the Secretary's actions in the event petitioners are successful in the case at bar and to refuse petitioners their rightful remedy based solely upon this anticipated reaction. The rule of *Williams v. Fanning* and the general rules pertaining to indispensable parties are not so limited. It is hornbook law that

> "[T]he test of indispensability . . . is whether the absent person's interest in the controversy is such that no final judgment or decree can be entered which will do justice between the parties actually before the court, without injuriously affecting the rights of others not brought into the action." Barron and Holtz-

[2] See footnote 2.

hoff, *Federal Practice and Procedure*, Section 512 at pp. 58-59.

It is obvious that the Secretary's rights are not affected by the relief sought here and the Court of Appeals does not say otherwise. All that petitioners seek is an adjudication that an order attempting to force employers to abide by the "90-10 policy" in hiring workers be declared illegal and unenforceable. It is still left wholly to the Secretary to decide whether workers should or should not be made available. If, however, the Secretary decides that workers should be made available, then petitioners are entitled to employ such workers without further requirements from the Secretary not based upon his delegated authority. Petitioners will obtain all of the relief they seek, and justice will be done, if the respondents are enjoined from enforcing the ruling. The Secretary will be free to administer the program according to his delegated authority and will not in any way be injured by the relief granted.

There is no question that the relief will expend itself against the respondents and that the Secretary will retain his freedom of action. The Court of Appeals actually assumes this freedom of action on the part of the Secretary. It is apprehension as to the misuse of this freedom which causes the Court to refuse to take jurisdiction. Yet if it is true that "Courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law" (*Waite v. Macy*, 246 U.S. 606, 38 S.Ct. 395), so, too, Courts will not *refuse* to issue injunctions on

the mere apprehension that, by thwarting the law, the administrator may bring to naught the relief granted. *Shaughnessy v. Pedreiro, supra; Williams v. Fanning, supra.*

There is, of course, the possibility that the Secretary will react to the relief granted in the case at bar by attempting to cut off the supply of workers available to the Rio Grande Valley. Petitioners were well aware of this possible reaction when they filed suit, and nevertheless chose to pursue their rights. For the Court of Appeals to take that choice away from petitioners is in reality to deprive petitioners of their day in court.

What has been said illustrates that the Court of Appeals, while couching its decision in terms of indispensable parties and effective relief, did not address itself to those questions. Under the reasoning of the Court petitioners are not merely required to go to Washington, D. C., to obtain relief; they are completely without remedy. Even the Secretary could not be enjoined according to the reasoning of the Court of Appeals since there is no reason to believe that such relief would more likely prevent him from refusing to allow workers to cross the border than would the same relief granted against his subordinates. At the same time there is no necessity for the Secretary to take other action to enforce the "90-10 policy" when the mere anticipation of such other action precludes petitioners from obtaining the only available relief from his present actions. He may merely continue what he is doing, legal or not. Petitioners are left completely without

remedy, either against the Secretary or his subordinates. Such a result would be contrary to petitioners' rights as conferred under the applicable statutes (7 U.S.C.A. 1461, *et seq.*) and treaties constituting the Migrant Labor Program, and would be contrary to this Court's pronouncement that

> "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated authority . . . Where, as here, Congress has given a right . . . it must be held that it intended that right to be enforced, and 'the courts . . . encounter no difficulty in fulfilling its purpose.'" *Leedom v. Kyne*, 358 U.S. 184, 190-191, 79 S.Ct. 180, 185.

Petitioners are all eligible to contract for Mexican workers under the Migrant Labor Program. (R. 32). The rights conferred upon them under the program are required to be protected by the Courts. *Leedom v. Kyne, supra; Stark v. Wikard*, 321 U.S. 288, 64 S.Ct. 559. The Court of Appeals in the case at bar has left petitioners powerless to seek redress of the violation of their rights.

The spurious reasoning of the Court of Appeals in the case at bar, if left to stand, will substantially hinder this Court's attempt to free the Federal procedure from archaic principles which have no place in present day society. [See *Varney v. Warehime*, (CA 6, 1945) 147 F.2d 238]. Respondents have obtained the same representation the Secretary of Labor would have received in a suit against him in Washington, D. C. The Government was fully

informed of the nature and progress of the suit; virtually all of the facts were stipulated; and any defenses which the Government wished to interpose were fully brought to the Court's attention. To anticipate that the administrator would abandon a program rather than give up illegal policies—and for this reason alone to refuse jurisdiction—disregards the intention of Congress in creating the program, disregards the delegation of authority granted to the administrator by Congress, and emasculates the rule of *Williams v. Fanning*, thereby requiring citizens again to litigate in Washington, D. C., all questions involving the administration of programs, if, indeed, there is still left open an area of litigable controversy.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLARK, THOMAS, HARRIS, DENIUS & WINTERS

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Counsel for Petitioners

Certificate of Service

I, Sander W. Shapiro, one of the attorneys for Petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the

day of August, 1961, I served copies of the foregoing Petition for Certiorari on Respondents by mailing a copy thereof with Air Mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D.C., and by mailing a copy thereof, Air Mail postage prepaid, to the United States Attorney for the Southern District of Texas, P. O. Box 3089, Houston 1, Texas.

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Counsel for Petitioners

APPENDIX "A"

1. The Opinion of the Court of Appeals appears at 290 F.2d 440, and reads as follows:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18478

CHARLES E. JOHNSON and E. E. SCANNELL,

Appellants,

versus

JEAN E. KIRKLAND, FIDEL LEAL FARMS, LA SARA HARVESTING ASS'N, RIO VISTA COTTON GROWERS' ASS'N, VALLEY FARMERS' COOPERATIVE HARVESTING ASS'N, LAKE FARMERS' COOPERATIVE SOCIETY, PRODUCER, HARVESTER AND FARMER COOPERATIVE SOCIETY, CONTINENTAL FARMERS' COOPERATIVE SOCIETY, RIO-VAL FARMERS' COOPERATIVE SOCIETY, SEBASTIAN FARMERS' COOPERATIVE SOCIETY, WILLAMAR FARMERS' COOPERATIVE LABOR SOCIETY, HARLINGEN FARMERS & PRODUCERS GIN, and COYOTES HARVESTING ASS'N,

Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(April 12, 1961.)

Before RIVES, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: The specific question raised by this case is whether the Secretary of Labor has the power under the Migratory Labor Act, 7 USCA §§1461-8, to impose a minimum wage scale or minimum wage fixing schedule for Mexican workers which is determined by standards other than the current prevailing domestic wage rate for like agricultural work. The District Court granted a preliminary injunction against the District Director of the Labor Department for the Rio Grande Valley area and the Manager of the "Bracero" Center, each being residents of the Southern District of Texas. No relief was granted against the Secretary of Labor, the Chief of the Bureau of Employment Security, Department of Labor, both residents of Washington, D. C., or the Regional Director of the Bureau of Employment Security who resides in Dallas.

Ordinarily we would not reach the substantive question for on such an appeal the issue is one merely of abuse of discretion pending a final hearing. *General Gas Corp. v. National Utilities of Gainesville, Inc.*, 5 Cir., 1959, 271 F.2d 820, 825; *Mansfield Hardware Lumber Co. v. Johnson*, 5 Cir., 1957, 242 F.2d 45, 46-47. But here it is a paradox that we have to consider (but not decide) the merits extensively to determine whether any relief properly could have been granted in the absence of the Secretary of Labor as a party. If he was indispensable in the sense of effective relief, then clearly the pre-

liminary injunction ought not to have been granted, and these proceedings should terminate without the further cost of precious judicial time. There is also a problem of mootness which is more readily disposed of as the merits illuminate the problem generally.

This Act had a triple purpose. First, to protect migrant Mexican workers—referred to traditionally as "wetbacks" because of their illegal entry across the Rio Grande—from exploitation by American employers whose normal economic power was enhanced by the illegal status of the workers. Second, to afford a needed supply of agricultural workers during peak harvesting seasons. And third, to accomplish the First and Second without detrimental effect on domestic workers.

The program envisaged a Migrant Labor Agreement between the Governments of Mexico and the United States[1] and individual employment agreements in the form of the Standard Work Contract prescribed by the inter-governmental Agreement. *United States v. Morris*, 5 Cir., 1958, 252 F.2d 643.

Under the statute the Secretary of Labor is authorized to establish and operate reception centers,

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[1] As there was some possibility that Mexico would not renew the Agreement, §1461 was amended March 16, 1954, by inserting the italicized words in the parenthetical clause "(pursuant to arrangements between the United States and the Republic of Mexico *or after every practicable effort has been made by the United States to negotiate and reach agreement on such agreements.)*." See 1954 U.S. Code Cong. and Adm. News, at 2043.

to provide transportation to and from Mexican recruitment centers and such reception centers, to supply some temporary subsistence to workers, to assist such workers and employers in negotiating labor contracts and to guarantee performance by American employers of the provisions of the Standard Work Contract relating to wages and transportation. 7 USCA §1461(2)-(6). The American employer is required to agree to indemnify the United States against loss by reason of its guaranty of the individual employment contracts §1462. The Act does not prescribe wage standards as such, although the Migrant Labor Agreement[2] and the Standard Work Contract[3] do. But it is clear that wages and

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[2] The Migrant Labor Agreement, Art. 9, provides that "Mexican workers shall not be employed * * * in any jobs for which domestic workers can be reasonably obtained or where [such] * * * employment * * * would adversely affect the wages and working conditions of domestic agricultural workers * * *." This preference must be given both for initial employment and when reducing the labor force.

Article 10 provides that "No employer will be permitted to contract Mexican Nationals unless: (1) he has received an authorization, (2) a certification has been issued with respect to his request for the employment of Mexican workers * * *."

Article 15 provides: "The employers shall pay the Mexican worker not less than the prevailing wage rate paid to domestic workers for similar work at the time the work is performed and in the manner paid within the area of employment, or at the rate specified in the work contract, whichever is higher. The determination of the prevailing wage rate shall be made by the Secretary of Labor. * * * In no case shall the Secretary of Labor make an authorization on the basis of any job order which specifies a wage rate found by the Secretary * * * to be insufficient to cover the Mexican worker's normal living needs. * * *."

[3] Article 4 of the Standard Work Contract is substantially the same as Article 15 of the Migrant Labor Agreement, note 2, supra.

standard hours of work were not to be such as to deprive willing available American workers of such jobs.

The key to our present controversy—§1463—bears directly on this. It provides that no workers shall be available unless the Secretary of Labor has determined and certified that (1) sufficient domestic workers are not available, (2) the employment of Mexicans will not adversely affect the wages and working conditions of domestic workers and (3) reasonable efforts have been made to attract domestic workers.[4]

The specific problem we face relates to piece work. Apparently on the insistence of the Mexican Gov-

[4] 7 USCA §1463.

"No workers recruited under this subchapter shall be available for employment in any area unless the Secretary of Labor has determined and certified that (1) sufficient domestic workers who are able, willing, and qualified are not available at the time and place needed to perform the work for which such workers are to be employed, (2) the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed, and (3) reasonable efforts have been made to attract domestic workers for such employment at wages and standard hours of work comparable to those offered to foreign workers. *In carrying out the provisions of (1) and (2) of this section, provision shall be made for consultation with agricultural employers and workers for the purpose of obtaining facts relevant to the supply of domestic farm workers and the wages paid such workers engaged in similar employment. Information with respect to certifications under (1) and (2) shall be posted in the appropriate local public employment offices and such other public places as the Secretary may require."

The portion starting at * was added by the Act of August 9, 1955, Chapter 679, §3, 69 Stat. 615.

ernment, the Secretary of Labor has adopted the fixed policy that the piece work rate must produce a minimum of 50¢ per hour for reasonably diligent workers. The latter qualification led to the crux of this dispute—the celebrated 90/10 formula. In a nutshell this simply means that 90% of the Braceros working for any one employer must each week make at least 50¢ per hour. The only escape was that if more than 10% averaged less than 50¢ per hour, the employer might prove that such workers were incompetent.

During the 1958 season, the Labor Department apparently followed a plan of voluntary compliance, but required a fixed minimum piece rate for specific commodities for those not complying. After numerous protests from American employers and prolonged conferences with the Department of which Congress had cognizance,[5] this plan was renewed for 1959 but with the minimum piece rate for cotton now being raised to $2.30. Addendums to the Standard Work Contract were required of those not demonstrating compliance and violators were informed that they would not be approved for employment.[6]

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[5] See, e.g., hearings on Problems in the Southwest and on Mexican Labor held February-March, June, July 1958 in connection with H. R. 7028, 10357-10361, 10968, at 604, 592-3.

[6] Approval is required under Art. 10 Migrant Labor Agreement, see note 2, supra. Art 7 of the Agreement further provides for listing American employers considered by the Mexican Government to be ineligible because of violations of the Agreement or the Work Contract. This Article also prescribed the machinery for determining disputes as to eligibility of employers. The machinery for investigation and determination of violations by American

That brings us to 1960. On June 28, 1960, the Secretary of Labor through the Regional Director at Dallas established for the Rio Grande area a ceiling of 55,000 Mexican workers for the period July 1, 1960 through July 31, 1960, based on the information described in the announcement and on the conditions prescribed.[7] While this implied a need

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employers or Mexican workers is prescribed in Art. 30 of the Labor Agreement.

Now pending before another panel of this Court are McBride Farms Marketing Assn. v. Johnson, 5 Cir., 1961, ... F.2d . . . . [No. 18617], and Rio Hondo Harvesting Assn. v. Johnson, 5 Cir., 1961, . . . F.2d. . . . [No. 18586]. Under the Joint Mexican-United States enforcement machinery of Arts. 30 and 7, the appealing employers were declared ineligible for further employment by reason of violations of the record-keeping provisions of the 90/10 policy. The District Court dismissed the suits for want of an indispensable party, the Director of the Bureau of Employment Security at Washington. If in the instant case we were to hold the 90/10 policy invalid, this would cut the ground out from under those adverse administrative determinations. This decision was reached, though, not because he or the Secretary promulgated the regulations in question but because under the eligibility dispute machinery the final appeal from the Regional Director's decision was his responsibility under 20 C.F.R. 612, subpart D, §§612.56-8; and a formal delegation of authority under General Order 56 (Rev.). On the other hand, those cases involve some questions not now before us. Appellants there argue not only that the 90/10 policy is void, but also that the procedures set up by the Migrant Labor Agreement have not been followed, that the evidence of violations is insufficient and that the Regional Director is the highest person having authority under the Agreement to make final decisions as to an employer's eligibility. This panel does not express any view on these questions or intimate what the decision in these other appeals will, or should, be.

[7] This document then stated: "The above ceiling is based on (1) information submitted by the Texas Employment Security Agency, (2) other pertinent data, and (3) representation by the State Agency that a reasonable ef-

for workers which under the statute could be filled by Mexicans only if domestic workers were not available, it did not purport to be the unqualified determination and certification required by §1463 (1)(2) and (3), note 4, *supra*. This announced ceiling has to be read in conjunction with the order of the Director, Bureau of Employment Security, Washington, D.C., of May 17, 1960. After briefly reviewing the unsatisfactory voluntary compliance program of 1958 and 1959, this order promulgated the 90/10 wage policy for 1960 and specified a piece rate of $2.50 per cwt for picking cotton or such higher rate as necessary to achieve 50¢ per hour.[4]

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fort has been made to obtain domestic workers through both intrastate and interstate sources.

"The employment of foreign workers under this ceiling is conditioned on: (1) continued efforts being made to recruit domestic workers for these jobs, (2) domestic workers replacing foreign workers wherever possible, (3) wage offers to domestic workers being not less than those made to foreign workers, and (4) posting of this ceiling in appropriate local employment offices and other public places."

[4] The order provided: "Faced with these facts and Secretary of Labor has determined that he is unable to certify under Section 503, Title 5 of the Agricultural Act of 1949, that the employment of Mexican National Workers * * * at a wage rate of less than $2.50 per hundred weight for picking cotton will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed.

"Close examination of records for compliance with the Department's 90/10 wage policy will be continued during the 1960 cotton harvest season since there is no assurance that the policy can be met by all employers paying $2.50 or more per hundred weight for cotton picking."

It was stipulated on the hearing below that this specified $2.50 minimum piece rate and the 90/10 policy was

On the argument before us, we became greatly concerned that since the order made specific reference several times to cotton picking "during the 1960 cotton harvest season" this case was moot. The parties thereafter by formal stipulation made explicit what the record otherwise implies that while the specific minimum piece rate of $2.50 per cwt for cotton is moot, the 90/10 policy applies to all piece work, and these plaintiffs are employers engaged in year around agricultural activities. As to that limited phase, the case is therefore moot. But as to the basic order imposing the 90/10 policy to achieve a minimum 50¢ per hour, the controversy still exists, is real and substantial as is manifested by the District Court's order enjoining the defendants from requiring compliance with "any other ruling of the Labor Department which requires Plaintiffs to contract Mexican workers at wages in excess of the wage paid to domestic workers, or at wages in excess of the prevailing wage, or which requires Plaintiffs to agree to abide by the so-called 90/10 policy."

Attacking this order as one beyond the statutory power of the Secretary, the employers' argument is essentially this. Mexicans may not be imported

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"not based upon the current prevailing wage rate" for this area as the "Secretary * * * has not made a prevailing wage rate determination" nor has the "Secretary * * * based the * * * wage rate * * * upon a determination in accordance with Article 15 of the * * * Agreement [see note 2 above] that a wage rate of less than" the specified rate "is insufficient to cover the Mexican workers" normal living needs.

if there is an adequate supply of domestic workers. Whether there is an adequate supply of domestic workers who are "able, willing and qualified * * * at the time and place needed to perform the work * * *" necessarily implies that this is tested against the current domestic wage rate or practice. Consequently, the Secretary's authority in the first instance extends to determination (and certification) that there is an insufficient supply of domestic workers. He is not concerned with wages except as it is a part of this determination. This, they say, is proved by §1461(5) and by the requirement in the Agreement and the Work Contract that Mexican workers and the employers are to bargain on wages with but one specific qualification—that it be not less than the prevailing wage. Once Mexican workers are allowed in the area, the Secretary's authority ceases until domestic workers again become available in adequate supply. If sufficient domestic workers subsequently come into the area, the Secretary must see that preference is given both in new employment and in reduction of labor force[*] and new employment of such domestics must be at "wages and standard hours of work comparable to those offered to foreign workers." §1461(3). The cumulative thrust of this is that the "adverse effect" element of §1463(2) refers only to preference in hiring and retention.

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[*] Art. 16 of the Agreement and Art. 10 of the Work Contract (compliance with which is the direct obligation of the United States) binds the employer to guarantee wages for 3/4ths of the contract period in the event of an enforced reduction.

To this thesis may be added further arguments. Not the least of these is the likelihood that the reciprocal operation of elements (1), (2) and (3) of §1463 necessarily relates to the current prevailing domestic wage rate. True, element (2) does not use such terms. But compliance with (3) in the actual efforts to recruit—"attract" domestic workers at the rate payable to Mexicans—and the ascertainment of an inadequate supply under (1) almost have to relate to the prevailing domestic wage rate. This argument gains some support from the 1955 amendments to §1463, see note 4, *supra*. The act as to elements (1) and (2) requires that the Secretary make an actual field survey and then post his findings. Inquiry on wages would have to relate to the currently prevailing domestic wage rate.

This total argument has its crucial climax in the express stipulation (note 8, *supra)* that in promulgating the 50¢ per hour 90/10 policy the Secretary did not do it on the basis of the current prevailing wage. Indeed, it was further stipulated that no such survey had yet been made for the region and locality in question. If not, then on what basis may the Secretary presume to certify that a lesser wage would "adversely affect the wages and working conditions of domestic" workers?

Offsetting this thesis is the powerful argument of the Secretary that if the employers are right, then element (2) was superfluous since on this theory it was necessarily a part of element (1). Further, the Section must be read as a whole and shows a

concern for more than *preference* as to lay-offs and new hirings either initially or after importation of Mexican workers. These arguments, pro and con, are certainly substantial, at least in the sense of meriting a careful analysis. But in view of the disposition we make, we think it inappropriate that we indicate, one way or the other, what conclusion should prevail. We have set them out to illuminate the critical problem of indispensable parties.

This turns, in our judgment, not on the fact that the regulation was issued by the Secretary in Washington or for him by the Director of the Bureau of Employment Security. Nor is it affected by the stipulated fact that the Regional Director in Dallas and the two enjoined local administrators have no authority to determine policy and are required to execute policies fixed by the Department. The first presupposes that validity of the questioned regulation cannot be determined unless the promulgator is there to champion its legality. The second assumes a duty on the part of the governmental subordinate to carry out orders regularly promulgated by superior authority no matter how illegal they may be. The law, as it has developed, rejects both notions. Given a court which has jurisdiction in the sense of a case within statutory jurisdiction,[10] presenting

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[10] This is clearly so here as the plaintiffs' relief depends directly on a law of the United States, 28 USCA §1331(a) and a law regulating commerce, 28 USCA §1337 (Wickard v. Filburn, 1942, 317 U.S. III, 63 S.Ct. 82, 87 L.Ed. 122). As to the latter there is no required minimum amount in controversy.

a real, not hypothetical, dispute by virtue of actions taken by local subordinates under such regulations, the superior officer is not ipso facto an indispensable party. Where the regulation is attacked as basically beyond the statutory or constitutional power of the Administrator,[1] a court, subject only to the qualification of the capability of granting effective relief, may, and must, adjudicate the issue. *Colorado v. Toll*, 1925, 268 U.S. 228, 45 S.Ct. 505, 69 L.Ed. 927; *Varney v. Warehime*, 6 Cir., 1945, 147 F. 2d 238; *Yarnell v. Hillsborough Packing Co.*, 1934, 5 Cir., 70 F.2d 435, 92 ALR 1475; *Ryan v. Amazon Petroleum Corp.*, 5 Cir., 1934, 71 F.2d 1 (reversed on other grounds in *Panama Refining Co. v. Ryan*, 1935, 293 U.S. 388, 55S.Ct. 241, 79 L.Ed.466); *Rood v. Goodman*, 5 Cir., 1936, 83 F.2d 28. The subject is extensively treated in the Annotation, 158 ALR 1126, see particularly Part III b, c, at 1132-36. The Agency or Executive Department has ample means to advance its contentions in support of the regulation.[2] And, as has been pointed out, the court having power over subordinates in such a situation is not required to assume that an authoritative ruling

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[1] This is the case here. No question arises whether, assuming power to promulgate some minimum wage schedule, practice or policy, the instant one is arbitrary or unreasonable. Indeed the briefs state that if the Secretary has authority to fix a wage policy, the 50c per hour, $2.50 per cwt for cotton, or the 90 '10 formula is as good as any.

[2] The Attorney General has the statutory responsibility for the interests of the United States in any pending suit. 5 USCA §316. Quite properly the subordinate local officials, enjoined below and appellants here, are represented by the United States Attorney joined by the Solicitor of Labor, Department of Labor.

by a competent court will likely be ignored by the superior who is not a party.[13]

In the Federal approach to this problem, the answer turns on practical considerations—practical in the sense of an orderly effective administration of justice. *Shaughnessy v. Pedreiro*, 1955, 349 U.S. 48, 54, 75 S.Ct. 591, 99 L.Ed. 868. The superior is indispensable as a party when, to secure the complainant from unauthorized governmental activity, it is essential that the superior take or not take action. If, on the other hand, the complainants' lawful rights may be vindicated by specific action or nonaction of the local subordinates pursuant to court order, the superior's presence is not indispensable. 158 ALR 1126, especially 1128-32; 2 Barron & Holtzhoff, Federal Practice & Procedure §515 at 82, 84, Wright Supp. at 37. All of this has been variously stated in *Williams v. Fanning*, 1947, 332 U.S. 490, 68 S.Ct. 188, 92 L.Ed. 95. "These [earlier] cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." 332 U.S. at 493.

[13] See, e.g., Shaughnessy v. Pedreiro, 1955, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868. "It is argued, however, that the Commissioner should be an indispensable party because a judgment against a District Director alone would not be final and binding in other immigration districts. But we need not decide the effect of such a judgment. We cannot assume that a decision on the merits in a court of appeals on a question of this kind, subject to review by this Court, would be lightly disregarded by the immigration authorities." 349 U.S. at 53.

In cases where a public official invades a private right either by exceedng his authority or by carrying out a mandate of his superior "relief against the offending officer could be granted" if doing so is "without risk that the judgment awarded would 'expend it-elf on the public treasury or domain, or interfere with the public administration.'" 332 U.S. at 493. That the local subordinate "would be left under a command of his superior to do what the court has forbidden" is, the court points out, "immaterial if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court. * * *" 332 U.S. at 494. See also *Shaughnessy v. Pedreiro*, 1955, 349 U.S. 48, 54, 75 S.Ct. 591, 99 L.Ed. 868; *Hynes v. Grimes Packing Co.*, 1949, 337 U.S. 86, 96-97, 69 S.Ct. 968, 93 L.Ed. 1231.

This means that the problem must be tested in terms of the result if, under the particular setting, the superior—not a party and hence under no coercive court order—sits tight and does absolutely nothing.

On that test the Secretary of Labor is here indispensable. That is demonstrated by a simple hypothesis. Were we to hold completely for the employers and declare this 90/10 policy illegal, they would gain naught by this litigation. That is because this policy is part and parcel of the affirmative determination and certification which the Secretary must make under §1463(1)(2) before any workers may become available.[11] Even though we were to hold

[11] It is expressly stated in these terms. See note 8, supra.

that the Secretary may not include that as an element, the statute still requires a determination by the Secretary that each of the conditions (1), (2) and (3) of §1463 have been met. Until he makes that determination, no Mexican worker—whether awaiting transportation from a migratory station in Mexico or assignment to eligible employers at an American Reception Center—may be allowed to work or even negotiate for work.

Measured in terms of action by the local administrators, the result is the same. On this hypothesis, the District Court order prohibited either of these administrators (or their assistants) from applying in any way the 90/10—50¢ per hour policy. But until the Secretary of Labor has certified the Mexican workers to be available, the local agents have nothing to operate on. The Mexican workers, wherever they may be physically, may not be assigned to work. The Court order would be ineffectual. It could grant no real relief.

Of course that is not to say that these employers are necessarily without some legal remedy. If the law, properly construed, does not permit the Secretary to include this 90/10 policy within element (2) of §1463, the necessity for his prior determination and certification would not likely give him license to withhold his discretionary duty arbitrarily. Undoubtedly any such conduct is subject to some judicial scrutiny. But by whatever name called—review under the Administrative Procedure Act, 5 USCA §§1001-1011, mandamus or other extraordinary

writ—this would involve the Secretary directly. And for that he should, and must, be a party.

REVERSED AND REMANDED.

Adm. Office, U.S. Courts—E. S. Upton Printing Co., New Orleans, La.

A true copy

Test: EDWARD W. WADSWORTH, Clerk, U.S. Court of Appeals, Fifth Circuit.

By Clara R. James, Deputy, New Orleans, Louisiana, July 12, 1961.

2. The Judgment of the Court of Appeals was entered April 12, 1961, and reads as follows:

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1960

No. 18,478

D. C. Docket No. 1369 Civil

CHARLES E. JOHNSON and E. E. SCANNELL,
Appellants,

versus

JEAN E. KIRKLAND, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before Rives, Brown and Wisdom, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

April 12, 1961

Issued: June 15, 1961

3. The Judgment of the Court of Appeals on Petitioners' Motion for Rehearing was entered June 1, 1961, and reads as follows:

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18478

CHARLES E. JOHNSON and E. E. SCANNELL,
Appellants,

versus

JEAN E. KIRKLAND, FIDEL LEAL FARMS, LA SARA HARVESTING ASS'N, RIO VISTA COTTON GROWERS' ASS'N, VALLEY FARMERS, COOPERATIVE HARVESTING ASS'N, LAKE FARMERS' COOPERATIVE SOCIETY, PRODUCER, HARVESTER AND FARMER COOPERATIVE SOCIETY, CONTINENTAL FARMERS' COOPERATIVE SOCIETY, RIO-VAL FARMERS' COOPERATIVE SOCIETY, SEBASTIAN FARMERS' COOPERATIVE SOCIETY, WILLAMAR FARMERS' COOPERATIVE LABOR SOCIETY, HARLINGEN FARMERS & PRODUCERS GIN, and COYOTES HARVESTING ASS'N,
Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(June 1, 1961)

On Petition for Rehearing

Before RIVES, BROWN and WISDOM,
Circuit Judges

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.

4. The Order of the Trial Court granting preliminary injunction appears at R. 146-148 and reads as follows:

ORDER GRANTING PRELIMINARY INJUNCTION

(filed July 19, 1960)

(Title Omitted)

This cause coming on to be heard on the motions of Plaintiffs for a preliminary injunction, and due notice having been given to Defendants, and the Court having considered the stipulation of facts entered into by all the parties and having considered the arguments of Counsel and being fully advised in the premises, it finds:

1. That the Defendants are requiring Plaintiffs to comply with the ruling of May 17, 1960, in order to obtain Mexican workers;

2. That the Defendants are requiring Plaintiffs to comply with the so-called 90/10 policy;

3. That Plaintiffs will be irreparably injured if this preliminary injunction is not granted in that in order to obtain workers to pick the cotton crop Plaintiffs must submit to the ruling of May 17, 1960, and pay workers $2.50 cwt; and in that, if Plaintiffs submit to the ruling of May 17, 1960, they will have lost their right to contest the wage figure being required by the ruling of May 17, 1960.

IT IS ORDERED, ADJUDGED AND DECREED that, pending further order of this Court, Defendants Charles E. Johnson and E. E. Scannell, and each of them, their agents, successors, deputies, servants, and employees, and all persons acting by, through, or under them or either of them or by or through this Order, be, and they are hereby restrained and enjoined from requiring Plaintiffs to employ workers at a wage rate of $2.50 per hundred weight of cotton picked (although Plaintiffs may voluntarily contract at that rate), or at any wage which is not the prevailing wage in the area, and from requiring Plaintiffs to agree to abide by the provisions of the ruling of May 17, 1960, or any other ruling of the Labor Department which requires Plaintiffs to contract Mexican workers at wages in excess of the wage paid to domestic workers, or at wages in excess of the prevailing wage, or which requires Plaintiffs to agree to abide by the so-called 90/10 policy.

It is further ordered, adjudged, and decreed that this Order shall be effective from and after 4:20 o'clock p.m. of the 18th day of July, 1960.

It is further ordered, adjudged, and decreed that this Order is conditioned upon the Plaintiffs furnishing a bond in the usual form in the amount of $50,000 to be approved by the Court.

It is further ordered, adjudged, and decreed that the motions of the Defendants to dismiss the action as to each of them be, and they are hereby continued

until the hearing on Plaintiffs' motion for a permanent injunction.

July 19, 1960.

JOE INGRAHAM
United States District Judge

APPENDIX "B"

1. Rule 19 of the Federal Rules of Civil Procedure as it relates to indispensable parties, states:

> "(a) Necessary Joinder. . . . persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants."

2. The statutory authority for the exercise of power by the Secretary of Labor is contained in 7 U.S.C.A., Section 1461, *et seq.* The portions of the statute relating to the merits of the case at bar read as follows:

> "§1461. Powers, duties, and guaranties of Secretary of Labor.
>
> "For the purpose of assisting in such production of agricultural commodities and products as the Secretary of Agriculture deems necessary, by supplying agricultural workers from the Republic of Mexico (pursuant to arrangements between the United States and the Republic of Mexico . . .), the Secretary of Labor is authorized—
>
> "(1) to recruit such workers . . .;
>
> . . .
>
> "(5) to assist such workers and employers in negotiating contracts for agricultural employment (such workers being free to accept or decline agricultural employment with any eligible employer and to choose the type of ag-

ricultural employment they desire, and eligible employers being free to offer agricultural employment to any workers of their choice not under contract to other employers);

. . ."

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"§1463. Certification of need for workers; consultation with employers and workers; posting of information.

"No workers recruited under this subchapter shall be available for employment in any area unless the Secretary of Labor has determined and certified that (1) sufficient domestic workers who are able, willing, and qualified are not available at the time and place needed to perform the work for which such workers are to be employed, (2) the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed, and (3) reasonable efforts have been made to attract domestic workers for such employment at wages and standard hours of work comparable to those offered to foreign workers. In carrying out the provisions of (1) and (2) of this section, provision shall be made for consultation with agricultural employers and workers for the purpose of obtaining facts relevant to the supply of domestic farm workers and the wages paid such workers engaged in similar employment. Information with respect to certification under (1) and (2) shall be posted in the appropriate local public employment offices and such other public places as the Secretary may require.

As amended Aug. 9, 1955, c .679, § 3, 69 Stat. 615."

3. The ruling which is the subject of the instant suit reads as follows (R. 36-38):

"To Employers of Mexican Contract Labor Starr, Hidalgo, Cameron and Willacy Counties, Texas.

May 17, 1960

"Gentlemen:

"After the 1958 cotton harvest season, employers in Starr, Cameron, Hidalgo and Willacy Counties, Texas, recognized the inadequacy of cotton piece rates in the area to permit compliance with the Labor Department's 90-10 wage policy. They sought, and were granted, an opportunity to demonstrate during the 1959 season that more effective efforts to comply with the Department's wage policy would be undertaken. A 'steering committee' of employer representatives in August again expressed these views and notified all employers on August 7, 1959, of the absolute necessity for their keeping accurate payroll records to assure compliance with the wage policy period.

"The employers' efforts to take action on a 'do-it-yourself' basis, have not resulted in reliable payroll data. Following the close of the 1959 cotton harvest season in the lower Rio Grande Valley, the records of thirty-five employers covering 36,574 Mexican contract workers were examined by Department of Labor representatives for completeness and accuracy.

The records of twenty-nine employers covering 34,395 workers revealed that the hours worked data were not derived from actual experience. This fact made the latter records unuseable by the Department for wage-policy-compliance purposes.

"On the basis of apparently accurate records of six employers in the Valley, it was found that three of them failed to meet the 90-10 wage policy during the 1950 season. Of the three employers found in compliance with the wage policy two were paying $2.50 per hundred weight before the end of the season.

"Without a factual payroll-record basis for determining the adequacy of the piece rate paid in the area during 1959 the Department was forced to resort to experience in other areas engaged in similar work.

"Faced with these facts the Secretary of Labor has determined that he is unable to certify under Section 503, Title 5 of the Agricultural Act of 1949, that the employment of Mexican National workers recruited under that Title in the 1960 harvest in Starr, Hidalgo, Cameron and Willacy Counties, Texas, at a wage rate of less than $2.50 per hundred weight for picking cotton will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed.

"Close examination of records for compliance with the Department's 90-10 wage policy will be continued during the 1960 cotton harvest season since there is no assurance that the policy can be met by all employers paying $$2.50 or more per hundred weight for cotton picking.

"You are therefore *again* advised of your responsibility to maintain accurate and complete records which are required by Article 19 of the Standard Work Contract and which are essential to the demonstration of compliance with the Department's wage policy.

Very truly yours,

/s/ T. C. Murrell,
Tracy C. Murrell,
Regional Director."

APPENDIX "C"

In the Court of Appeals the parties entered into the following Stipulation (Tr. 270):

STIPULATION

The parties hereto, by their respective counsel of record, hereby agree that for purposes of considering the instant appeal, the following additional facts are stipulated to be true:

1. Appellees are either contractors, employers, or users of Mexican workers under the Migrant Labor Program for all crops harvested in the Rio Grande Valley, under the same circumstances as exist with respect to cotton workers.

2. The piece-rate method of paying wages is used in harvesting of all crops grown in the Valley.

3. Some crop is harvested in the Valley in each month throughout the year.

4. The 90-10 policy applies to all piece-rate activities. Its threatened enforcement is as real today as it was at the beginning of the cotton picking season, and the consequences of that enforcement are

the same today as they were at the beginning of the cotton picking season.

/s/ William B. Butler
William B. Butler

/s/ Robert C. Maley, Jr.
Robert C. Maley, Jr.
Attorneys for Appellants

/s/ Donald S. Thomas
Donald S. Thomas
/s/ Sander W. Shapiro
Sander W. Shapiro

Attorneys for Appellees